IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANDRE ROYAL, Plaintiff, v. NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL, *et al.*, Defendants.	No. 1:19-cv-5164-AJN **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN OPPOSITION TO THE BOARD DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT, AND RESPONSE TO THE BOARD DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S JURY DEMAND

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

OTHER AUTHORITIES

STATE STATUTES

PRELIMINARY STATEMENT

Plaintiff, Andre Royal ("Royal"), spent his life chasing his dream of becoming a professional football player in the National Football League ("NFL"), only to become totally and permanently disabled by the very sport and league he, and thousands of others, so desperately wanted to be a part of. Now, after giving a majority of his life, body, and brain for this multi-billion dollar enterprise, the NFL wants to continue to deny him the disability benefits he was entitled to from the moment he hung up his cleats to never play again.

Royal filed his Amended Complaint against the Defendants simply seeking the disability benefits he was entitled to back when he initially applied for disability benefits–"Active Football" disability benefits. Royal's Amended Complaint, like many others before him, and presumably many after him, alleges that the Board Defendants, through their duties as fiduciaries of the Plan, misinformed, intentionally concealed, and continuously restricted him, as well as other former NFL athletes, from receiving a Summary Plan Description, and other necessary documentation needed to apply for benefits for their disabilities that arose throughout their careers in the NFL. The Board Defendants continue to mock and underscore the serious issues that the NFL has been concealing for decades, that is, once the players' services are no longer needed, the NFL will do any means necessary to prevent former NFL athletes to receive compensation for the total and permanent disabilities that arose through the game of football.

The Board Defendants continue to reference the *Hudson* lawsuit as something that should allow this Court to discredit Royal's allegations; in fact, *Hudson*, like so many others[1] before him, cast a bright light on the nature of the NFL and the shear impossibility it is for former football players to be adequately compensated by the Board Defendants for the total and

[1] *Keys v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 387 F. Supp. 3d 1372 (M.D. Fla. 2019); *Mickell v. Bert Bell/Pete Rozelle NFL Players Ret. Plan*, No. 15-62195-CIV, 2019 WL 656328 (S.D. Fla. Jan. 15, 2019); *Dimry v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, No. 16-CV-01413-JD, 2018 WL 1258147, at *4 (N.D. Cal. Mar. 12, 2018); *Solomon v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 860 F.3d 259 (4th Cir. 2017); *Schlichter v. Bert Bell/Pete Rozelle NFL Players Ret. Plan*, No. 1:16-CV-61-WTL-TAB, 2017 WL 1001204, at *1 (S.D. Ind. Mar. 15, 2017); *Hudson v. Nat'l Football League Mgmt. Council, et al.*, No. 1:18-cv-4483 (S.D.N.Y. filed May 22, 2018); *Jani v. Bell*, 209 F. App'x 305, 320 (4th Cir. 2006).

permanent disabilities the players received from league play. However, since Royal raised his claims to the Disability Board four years before the *Hudson* case was filed. This should not be the single biggest reason for denying his case as the Defendants state. It should be confirmation that a pattern exists by these Defendants. The cases referenced are but a small percentage of the overwhelming cases continuously filed on behalf of former football players that are repeatedly denied benefits, or placed into lower-paying benefit categories for the sole purpose of the NFL not having to fully compensate a player who received total and permanent disabilities while being in the NFL. The *Hudson* lawsuit, is similar to the instant case because these former football players all suffer from severe injuries they sustained in the NFL, and the players are systematically being denied benefits and not provided key documents and definitions to allow them to properly apply for disability benefits through the NFL's Plan.

The Board Defendants want this Court to base its decision on the report and recommendation of Magistrate Judge Lehrburger, that has yet to be fully briefed and fully determined. (ECF No. 16 at 1); *see also* 9/5/19 Report & Rec., *Hudson v. Nat'l Football League Mgmt. Council, et al.*, No. 1:18-cv-4483. The Board Defendants know that even though many of the same allegations and claims in Royal's Amended Complaint and in the *Hudson* complaint are similar, the Board Defendants continuously withheld key documents and definitions from Royal before Royal could even make an informed decision about the disability benefits he was applying for, or appeal an incorrect classification without those documents and subsequently denied higher-paying benefits based on definitions never explained to him or furnished to Royal for him to fully understand and use in his appeals to the Board Defendants for Active Football benefits.

Royal retired from the NFL due to seizures that made him unable to play the game anymore. Royal, although suffering from seizures that the NFL teams he played for knew about, continued to play until those seizures became totally and permanently disabling. The Board Defendants want this Court to believe that because Royal did not apply for benefits right after the first sign of a seizure, that he is not entitled to Active Football benefits. The disability plans rules don't require a disabled player to apply for disability within this time frame. It requires that

the disability become permanent and total during this period. This view argued by the Board Defendants is grossly disturbing and completely unfathomable to comprehend. In other words, the Board Defendants want this Court to find that Royal is not entitled to Active Football benefits because he played ***two years*** with a disability that the NFL knew about and that team doctors medically cleared him to play with. In fact, the NFL was the only ones who knew Royal shouldn't be playing football at that time based on their answer. The Board Defendants are essentially admitting that they are allowing NFL players to play with what the NFL defines as a "total and permanent disability" but then argues that players, who receive a disability and continue to play until that condition becomes so disabling that their entire lives are changed forever, cannot receive Active Football benefits because they didn't apply for total & permanent disability before they knew they were totally and permanently disabled from an injury. The Board Defendants cannot have it both ways. Either the player has a total and permanent disability that forces them to retire from the game, or he doesn't. Arguing that Royal had a total and permanent disability, but continued to play through it for two years, and because he attempted to continue to work to support his family and play the game he loved, that's the reason he is denied Active Football benefits is very concerning on the part of the Board Defendants. This illogical argument makes little sense and is absolutely not supported by the Plan or explained as to be understood by the average participant of the Plan.

The Amended Complaint states viable claims for the Board Defendants' violations of ERISA § 102(a), 29 U.S.C. § 1022(a), by failing to provide Royal with a Summary Plan Description ("SPD"), in general, and with proper disclosures about the terms of the Plan (Count I); for the Board Defendants' breach of their fiduciary duties under ERISA § 404(a)(1)(A) & (B), 29 U.S.C. § 1104(a)(1)(A) by failing to disseminate the SPD to Royal (Count II); and the Plan's statute of limitations provision contradicts ERISA, and should be void (Count V).[2]

[2] Royal does not object to the dismissal of Count IV as it has been represented by these Defendants in the *Hudson* case that the "2017 Plan Amendment" at issue does not apply to Royal. *See Hudson*, No. 1:18-cv-

FACTUAL BACKGROUND

A. Andre Royal

Royal is a former professional football player with the NFL. He started his career with the Carolina Panthers and played with that club from August 20, 1995 until the start of his fourth season in the NFL when he signed a contract with the New Orleans Saints in 1998. (Ex. 14 to Hilliard Decl.[3]) In his fourth accredited season, and on July 25, 1998, Royal suffered from a petit mal, or single-episode, seizure the night before training camp was scheduled to begin. Amended Complaint ("AC") ¶ 40. When Royal arrives at training camp Head Coach Mike Ditka accuses Royal of faking a head injury in a team meeting. This clearly indicates that the NFL did not think Royal was even injured let alone disabled at that time. After being medically cleared by team doctors to play, Royal went through training camp and suffered from another seizure on the team plane after a pre-season game on August 15, 1998. *Id.* On August 30, 1998, he was traded to the Indianapolis Colts. AC ¶ 40. In the documentation sent by the New Orleans Saints to the Indianapolis Colts, the Saints list under Royal's medical history, "7/98 – Single Episode Seizure". (Ex. 3 to Hilliard Decl.[4]) In further documentation sent by the Saints, listed under "Medical Problems," the Saints report "7/98 – Single Episode Seizure [and] 8/14/98 – Grand Mal Seizure". (Ex. 4 to Hilliard Decl.)

At this point, at least two NFL teams knew about Royal's seizures and they continued to trade him and allow him to play for the clubs, clearly showing that these seizures had not risen to the level of a total and permanent disability. *Id.*; *see also* (Ex. 15 to Hilliard Decl.). In fact, after

---

4483 (ECF No. 75 at 8.). Royal need not address County III as that is not a subject of the Board Defendants' Motion to Dismiss.

[3] All "Hilliard Decl." references are to the Declaration of Robert C. Hilliard, dated September 30, 2019, filed as "Exhibit A" to this Memorandum. All "Ex." references are exhibits that have been appended to the Hilliard Declaration.

[4] The Court may consider additional materials, including documents attached to the complaint, documents incorporated into the complaint by reference, public records, and documents that the Plaintiff either possessed or knew about, and relied upon, in bringing the suit. *See Kleinman v. Elan Corp.*, 706 F.3d 145, 152 (2d. Cir. 2013) (quoting *ATSI Communications, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007)); *see also, Yak v. Bank Brussels Lambert*, 252 F.3d 127, 130 (2d Cir. 2001) (explaining that on a Rule 12(b)(6) motion to dismiss, court may consider any documents of which the parties had actual notice, and which are integral to the complaint).

he left the Colts, other NFL teams including the Dallas Cowboys continued to tender offers to Royal through his agent. The Board Defendants' arguments that Royal was totally and permanent disabled in 1998 contradicts the evidence showing that clubs were still using Royal as an asset for their teams in 1999. *Id.*

Despite the fact that Royal still had two years left on a guaranteed four-year contract, on October 9, 1999, the Colts suspend Royal "for conduct detrimental to the team" after Royal showed up late to a team meeting covered in blood and urine after having suffered a seizure in his sleep. (Ex. 11 to Hilliard Decl.) Royal told his coach that he had a seizure and was late because of it, however, the Colts still decided to suspend Royal. *Id.* On October 11, 1999, the Colts file a "Notice of Termination" for Royal stating, "In the judgment of the Club, your skill and performance has been unsatisfactory as compared with that of other players competing for position on the Club's roster." (Ex. 16 to Hilliard Decl.)

Instead of Royal meeting with other teams and attempting to play professional football, he officially retires from the NFL and applies for disability benefits due to his continued symptoms of brain trauma which include, seizures, memory loss, debilitating headaches, inability to sleep, etc. 5 months later. In March of 2000, Royal requests an application for disability benefits under the Bert Bell/Pete Rozelle NFL Retirement Plan ("Plan"). (Ex. 2 to Hilliard Decl.) at 2. In two letters sent by the Board Defendants on March 2, 2000 and July 12, 2000, the Board Defendants enclosed an application for disability benefits under the Plan. (Ex. 2 to Hilliard Decl.) In both of the letters, the Board Defendants state, "**We are sending you a copy of the Plan Document[5] which further explains the disability provisions**." *Id.* What is apparent from both of these letters are the facts that: (1) the Board Defendants knew that Royal did not have a copy of the "Plan Document" in order to fill out his application for disability benefits, (2) the Board Defendants, without explanation, failed to include the "Plan Document,"

[5] In both letters it is unclear whether "Plan Document" is referring to the actual 1995 Plan, or the Summary Plan Description, but either way, both of those documents were never sent to Royal before he completed his application for benefits. (Ex. 2 to Hilliard Decl.)

1995 Plan, or SPD, along with the applications for disability benefits in both letters, (3) the Board Defendants never sent out a copy of the "Plan Document," 1995 Plan, or the SPD,[6] and (4) the Board Defendants didn't send the Plan during the appeal process even after Royal's representative repeatedly calls, then writes for the Plan.

On May 11, 2000, Royal officially retires from the NFL. (Ex. 17 to Hilliard Decl.) On July 22, 2000, less than one year after Royal was forced to leave the Colts due to his continued seizures, Royal fills out his application for disability benefits. (Ex. 18 to Hilliard Decl.). The Board Defendants receive his application for benefits on October 10, 2000. *Id.* In his application for disability benefits, Royal states that he suffers from "unpredictable and uncontrollable seizures that have continued into retirement." *Id.* at 2. This is further evidenced by the Board Defendants' own physician's report where Dr. Ronald Folmer clearly states that the "present disability" occurred in "November 1999," *shortly after* and less than **one year** before Royal applied for disability benefits on October 10, 2000. *Id.*; *see also* (Ex. 6 to Hilliard Decl.) at 1-2. Dr. Folmer goes on to explain that the nature of the disability, which evolved from the single-episode and grand mal seizures reported by the Saints and Colts, into "Recurrent Seizures – Epilepsy" making Royal at that time in November 1999, "substantially unable to engage in any occupation for any renumeration or profit" and that "injury" resulted "from football related activity." *Id.*; *see also* (Ex. 3, 4, and 11 to Hilliard Decl.)

In his application for disability benefits, and because Royal was never provided a copy of the "Plan Document" as promised in two letters from the Board Defendants, Royal selects the "Football Degenerative" category. (Ex. 18 to Hilliard Decl.) at 1. Unbeknownst to Royal, is the fact that he incorrectly applied for the wrong disability category. AC ¶¶ 41, 42. Since Royal, as stated by the Board Defendants' physician in his report, received his total and permanent

[6] It should be noted that in the eight (8) exhibits to the Michael L. Junk Declaration, not one exhibit was produced by the Board Defendants definitively showing that the Board Defendants sent Royal a copy of the Plan that applied to his application for benefits. In fact, in the 441 pages in the "NFL File" produced by the Board Defendants to Royal, there is not one letter to Royal stating that the Plan was enclosed and sent to him so he could make an informed decision when it came to his application of disability benefits. (Ex. 1 to Hill. Decl.)

disability in **November of 1999** and applied for his benefits on **October 10, 2000**, he absolutely qualified for Active Football benefits at the time of his original application for benefits, because his total and permanent disability arose shortly after, and within one year, of his application for benefits. (Ex. 6 to Hilliard Declar.) at 1-2; *see also* (Ex. 18 to Hilliard Decl.) at 1.

On April 20, 2001, the Board Defendants, incorrectly, grant Royal "Inactive Total and Permanent Disability" benefits. (Ex. 7 to Hilliard Decl.) This is different than what Royal uninformatively applied for. (Ex. 18 to Hilliard Decl.) at 1. Then, roughly six months after the Board Defendants realized their error, and without showing a "clear and convincing change in circumstances," puts Royal into the Football Degenerative category. (Ex. 5 to Hilliard Decl.)

On May 14, 2015, Stephanie Anderson, mother of Royal's daughter, and as Royal's representative in dealing with the Board Defendants, requests that Royal be reclassified into the Active Football benefits category. AC ¶ 47. The Board Defendants, on June 29, 2015, state that Royal is not entitled to reclassification because he did not present "clear and convincing evidence that [Royal] meet[s] the qualifications for Active Football category and because of changed circumstances." (Ex. 10 to Hilliard Decl.) at 3. In this letter from the Board Defendants, and in all the documents received by Royal up to this time, Royal had never seen nor been explained the definition of "clear and convincing" or "changed circumstances". *Id.*

Again, in August of 2015, Ms. Anderson, on behalf of Royal, tries to explain to the Board Defendants that Royal: (1) never had the original Plan and SPD when he applied for disability benefits, (2) Royal qualified for Active Football benefits at the time of his original application, but for the Board Defendants failure to produce the relevant Plan and SPD, or exercise their fiduciary responsibility to Royal to place him in the correct classification since he did not have the information to select that category, and (3) Royal continues to suffer from the same total and permanent disability he was diagnosed with in **November of 1999**, eight months prior to his application of benefits on **October 10, 2000**. AC ¶ 49. Again, under the Plan document, Royal does not have to apply for disability benefits within this window, he must only become totally and permanently disabled within 12 months of his injury arising. Royal asked for a disability

application within 5 months of his total & permanent diagnosis date of November 1999 in March of 2000. The Defendants were the only ones with all the information including the Plan definitions to know that Royal qualified for Active Benefits at that time.

On December 12, 2015, the Board Defendants send Royal a "Final Decision on Appeal for Reclassification" stating that Royal does not qualify for reclassification under the clear and convincing changed circumstances standard, and finally gives him their definition of what "clear and convincing changed circumstances" is:

> Like the Committee, the Retirement Board construed Ms. Anderson's request for "review" as a request for reclassification of benefits, which is governed by Section 5.5(b) of the Plan (quoted above). Section 5.5(b) permits reclassification of benefits only where a Player provides "clear and convincing" evidence of "changed circumstances' warranting 'a different category of total and permanent disability benefits." **In this and all other instances, the Retirement Board interprets Section 5.5(b)'s 'changed circumstances' requirement to mean a change in a Player's condition–such as a new or different impairment–that warrants a different category of benefits.**

(Ex. 12 to Hill. Decl.) at 4 (emphasis added). The first time Royal was actually given a full explanation of what he needed in order to attempt to be reclassified into a category of benefits he was originally entitled to was on December 12, 2015, in the final decision by the Board Defendants to deny his request to be placed into the category he was originally entitled to be in. Up to this point, Royal had still not been provided the 1995 Plan and 1999 SPD that applied to his original application of benefits. AC ¶ 50. On February 1, 2016, Ms. Anderson, on behalf of Royal, **requests for at least the third time**, the actual Plan and SPD that applied to his original application, and was finally given the relevant Plan and SPD over sixteen years after the Board Defendants' doctor determined he was totally and permanently disabled from NFL related activity. *Id.*

B. The Bert Bell/Pete Rozelle NFL Retirement Plan

The Plan is a multi-employer retirement plan that provides various pension, disability, and other benefits to eligible professional football players. AC ¶ 29. Multi-employer plans are maintained pursuant to collective bargaining agreements between employers and employee

organizations, which require multiple employers, in this case the NFL teams, to "pool contributions into a single fund that pays benefits to covered retirees who spent certain amount of time working for one or more of the contributing employers." *Trustees of Local 138 Pension Trust Fund v. F.W. Honerkamp Co., Inc.*, 692 F.3d 127, 129 (2d Cir. 2012); *see also* 29 U.S.C. § 1002(37)(A).

In this case, the Plan was created through the collective bargaining agreement between the National Football League Management Council ("Council"), representing the NFL clubs, and the National Football League Players Association ("NFLPA"), representing the current and former NFL players. AC ¶¶ 19, 20. The Retirement Board of the Plan ("Retirement Board") is made up of individual board members: Katherine Blackburn, Richard Cass, Ted Phillips, Samuel McCullum, Robert Smith, and Jeffrey Van Note (collectively, the "Individual Board Defendants" and, together with the Retirement Board, the "Board Defendants"). AC ¶ 21, 22, 23, 24, 25, 26, 27.

The Plan is an employee pension benefit plan within the meaning of ERISA, 29 U.S.C. § 1002(2)(A). AC ¶ 29. In addition to the Plan, Royal's case also involves the SPD applicable to his original application for benefits. AC ¶¶ 13, 50. ERISA requires that plan administrators, here the Board Defendants, to furnish SPDs to plan participants, here Royal, which will give him basic information about when he can begin to participate in the Plan and how to file a claim for benefits. ERISA § 102(a), 29 U.S.C. § 1022(a). If the Plan was changed, Royal should have been informed, either through a revised SPD, or in a separate document called a summary of material modifications. *Id.* (requiring that summary plan descriptions "be written in a manner calculated to be understood by the average plan participant" and to "be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan.")

The Plan at issue provides former players with different benefit levels with differing compensation rates depending on whether the player is disabled, and whether that disability, if found, was a result of playing in the NFL. AC ¶ 40; *see also* (ECF 16-5) at 15-17. In Article

5.1, there are four different categories of benefits available to qualifying former NFL athletes, two of which are relevant in this case. *Id*. Collectively, these categories are known as Total and Permanent Disability (T&P") benefits. *Id.*

The two relevant T&P benefit categories for Royal's case are: **Active Football** and **Football Degenerative**. *Id*. Active Football T&P benefits are defined as follows:

> Active Football. The monthly total and permanent disability benefit will be no less than $4,000 if the disability(ies) results from League football activities, arises while the Player is an Active Football Player, and **causes the Player to be totally and permanently disabled 'shortly after' the disability first arises**.

Id. (emphasis added). Football Degenerative, on the other hand, differs from Active Football, and is defined as follows:

> Football Degenerative. The monthly total and permanent disability benefit will be no less than $4,000 if the disability(ies) arises out of League football activities, and results in permanent disability before fifteen years after the end of the Player's last Credited Season.

Id. The Plan allows for players to seek benefits for one benefit and then later apply to be reclassified at a different level. (ECF 16-6) at 16. As stated above, in order for a player to seek reclassification, the player must show "clear and convincing" evidence that because of "changed circumstances," the player satisfies the conditions of eligibility for a new classification. *Id.*

As the Plan's Administrator, the Board Defendants, were responsible for ensuring the SPD met the requirements of ERISA § 102. AC ¶ 21. The Board Defendants also had fiduciary duties to make certain disclosures, including the SPD itself, to Plan participants under ERISA § 404(a)(1)(A). *Id.* Royal states a viable claim that the Board Defendants, as fiduciaries under ERISA, violated ERISA § 102(a), 29 U.S.C. § 1022(a), by failing to furnish Royal a copy of the SPD prior to his original application of benefits so that he could be informed when filling out the seemingly and absolutely determinative application of benefits. AC ¶¶ 53, 58, 62. Plaintiff further states a viable claim that the Board Defendants breached their fiduciary duties by failing to disclose key interpretations and definitions in the SPD, as well as disclosing and furnishing the SPD itself to Royal prior to his original application of benefits. AC ¶¶ 52, 53. Plaintiff also

alleges with specificity that the Board Defendants committed fraud or fraudulent concealment with respect to the SPD and the Plan, and that the Board Defendants further breached their fiduciary duties by withholding the relevant SPD and Plan from Royal, even after repeated requests, and especially before his application for benefits. AC ¶¶ 10, 42, 47, 48, 55, 69, 72. This is further shown in the Board Defendants' correspondence to Royal where they continued to provide applications for benefits, with promises to send the undefined "Plan Document," assumingly the SPD and Plan, but continuously concealed that relevant SPD from Royal. (Ex. 2 to Hilliard Decl.) at 1-2. This fraud or fraudulent concealment perpetrated by the Board Defendants for over sixteen years has caused Royal to be deprived of the financial benefits he has been entitled to since November of 1999, when he was diagnosed with epilepsy related to league play, and if Royal had the actual SPD that the Board Defendants continued to say that was going to be sent to him, he would have had the proper definitions to apply for the Active Football disability benefits he was entitled to, since he applied for benefits "shortly after" and within one year of his total and permanent disability arising or supply evidence supporting his classification if the Defendants didn't agree with their own independent medical reports. (Ex. 6 to Hilliard Decl.). Plaintiff respectfully asks this Court to deny the Board Defendants' motion to dismiss with respect to Counts I, II, and V.

ARGUMENT & AUTHORITIES

Plaintiff has sufficiently alleged facts to support the allegations in the Amended Complaint, as detailed below. The Federal Rules of Civil Procedure show a clear preference for allowing plaintiffs to fully present their cases, rather than allowing defendants to short-circuit cases in the early stages of the proceedings. Because Plaintiff's Amended Complaint sufficiently alleges cognizable legal claims against the Board Defendants, the Court should deny the motion to dismiss and permit this case to move forward.

I. MOTION TO DISMISS STANDARD

Federal Rule of Civil Procedure 12(b)(6) allows for dismissal of an action for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In reviewing a motion to dismiss, the Court must accept all factual allegations set forth in the complaint as true, and draw all reasonable inferences in favor of Plaintiff. *Erickson v. Pardus*, 551 U.S. 89, 93-94, 127 S.Ct. 2197 (2007). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007). A complaint's factual allegations must be enough to raise a right to relief above the speculative level. *Id.* at 550 U.S. at 555. Although, once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. *Id.* at 563. Determining whether a complaint states a plausible claim for relief will be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 129 S.Ct. 1937 (2009).

When ruling on a Rule 12(b)(6) motion to dismiss, a court may consider any written instrument attached to the complaint as an exhibit, or any statements or documents incorporated by reference, as well as matters of which judicial notice may be taken, and documents either in the plaintiff's possession or of which the plaintiff had knowledge and relied upon in bringing the suit. *Kalyanaram v. Am. Ass'n of Univ. Professors at the N.Y. Inst. of Tech., Inc.*, 742 F.3d 42, 44 n. 1 (2d Cir. 2014).

"Plausibility is a standard lower than probability, a given set of actions may well be subject to diverging interpretations, each of which is plausible." *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 164, 184 (2d Cir. 2012) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (explaining "two or more witnesses" may tell mutually inconsistent but "coherent and facially plausible stor[ies]")). "The choice between or among plausible inferences or scenarios is one for the fact finder" and "is not a choice to be made by the court on a Rule 12(b)(6) motion." *Id.* (citing *Todd v. Exxon Corp.*, 275 F.3d 191, 203 (2d Cir. 2001)). As a

result, "[a] court ruling on such a motion may not properly dismiss a complaint that states a plausible version of events merely because the court finds a different version more plausible." *Id.* at 185. The court is required, when determining whether a plaintiff's complaint states a plausible claim, to proceed "on the assumption that all the [factual] allegations in the complaint are true." *Twombly*, 550 U.S. at 555. Even if the court is of the opinion that the plausibility of the truth seems doubtful, "Rule 12(b)(6) does not countenance … dismissals based on a judge's belief of a complaint's factual allegations." *Id.* at 556. "Given that the plausibility requirement '**does not** impose a **probability** requirement at the pleading stage' the *Twombly* Court noted that 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely.'" *Anderson News*, 680 F.3d at 185; *Ott v. Fred Alger Mgmt., Inc.*, 2012 WL 4767200, at *6 (S.D.N.Y. Sept 27, 2012) (emphasis added) ("While other inferences from the facts also may be plausible, a court 'may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible.'").

The Court, in accepting all factual allegations as true, and drawing all reasonable inferences from those factual allegations, will find that Royal has viably stated claims against the Board Defendants, making the Board Defendants' motion to dismiss subject to denial.

II. COUNT 1 SUFFICIENTLY ALLEGES A CLAIM UNDER ERISA § 102

Royal alleges that the Board Defendants, as the Plan Administrators, violated ERISA § 102, 29 U.S.C. § 1022, by failing to provide Royal a copy of the Plan or SPD before he applied for his original application for benefits, by failing to write the Plan or SPD "in a manner calculated to be understood by the average plan participant, by failing to reasonably approve Royal, as a plan participant, of his rights under the Plan, and by failing to disclose key definitions and terminology that would be beneficial when apply for disability benefits or when seeking reclassification of disability benefits. AC ¶¶ 52, 53, 55, 56, 58, 59, 60. Count I alleges that Royal never discovered that the Board Defendants were using something different than the plain

and ordinary definitions in the Plan or SPD until after his final denial of reclassification. *Id.* ¶ 59.

A. Count I Alleges that the SPD Violated ERISA § 102 and Plaintiff has Standing to Bring this Claim

Count I alleges that the Board Defendants failed to properly apprise Royal of the standards by which his original application of benefits would have been considered, and any subsequent reclassification he sought. *Id.* ¶¶ 52, 53, 55, 56, 58, 59, 60. This failure by the Board Defendants is a violation of ERISA § 102, 29 U.S.C. § 1022.

"A summary plan description of any employee benefit plan **shall be furnished** to participants and beneficiaries as provided in section 1024(b) of this title." 29 U.S.C. § 1022 (emphasis added.) SPDs are to be furnished to each participant of the Plan within 90 days after he becomes a participant, or if later, within 120 days after the Plan becomes subject to 29 U.S.C. § 1024. 29 U.S.C. § 1024(b)(1)(A)-(B). Under ERISA § 502(c)(1), 29 U.S.C. § 1132(c), a court in its discretion may award up to $100.00 per day for each day against a plan administrator who fails to provide requested documents within 30 days. 29 U.S.C. § 1132(c)(1). At the very least, Royal has standing to bring Count I because Royal has not been provided the requested documents under ERISA, and the Board Defendants' failure to provide the necessary documents prior to his application for benefits. AC ¶¶ 10, 30, 41, 42, 43, 50.

Under Article III of the Constitution, federal courts have jurisdiction only over "Cases" and "Controversies." U.C. Const. Art. III, § 2, cl. 1. "When a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue." *Connecticut v. Physicians Health Servs. Of Connecticut, Inc.*, 287 F.3d 110, 116 (2d Cir. 2002) (quoting *Sierra Club v. Mortion*, 450 U.S. 727, 731-32, 92. S.Ct. 1361 (1972). Royal as alleged a "concrete and particularized" and "actual" "injury-in-fact" as articulated by the Supreme Court, and that injury has affected Plaintiff in a "personal and individual way." *Lujan v. Defendants of Wildlife*, 504 U.S. 555, 561 (1992); *see also* AC ¶ 11, 53, 59, 62, 70. Because Royal was never provided the

SPD or the Plan prior to his original application for benefits, Plaintiff was injured by not having the critical and relevant documentation he absolutely needed before filling out the application for benefits that has haunted him for nineteen years. AC ¶¶ 45, 53, 58, 59, 60, 62.

"SPDs are central to ERISA." *Frommert v. Conkright*, 738 F.3d 522, 531 (2d Cir. 2013). An employee's "primary source of information regarding employment benefits" comes from the SPD. *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 110 (2d Cir. 2003). The contents of the SPDs are governed by ERISA § 102 and the associated Department of Labor regulations. *Id.* Importantly, ERISA § 102 requires that the SPD must explain the Plan's eligibility requirements and "the circumstances which may result in disqualification, ineligibility or denial or loss of benefits." *Id.* (citing 29 U.S.C. § 1022(b) and 29 C.F.R. § 2250.102-3(*l*)). In order to comply with ERISA, these explanations in the "SPD must be written in a manner calculated to be understood by the average plan participant and must sufficiently accurate and comprehensive to apprise participants and beneficiaries of their rights and obligations under the plan." *Id.* (quoting 29 U.S.C. § 1022(a)). This is not a hypothetical "average plan participant" but needs to "account" for "the level of comprehension and educations of *typical participants in the plan* and the complexity of the terms." 29 C.F.R. § 2520.102-2(a) (emphasis added). Although Royal was provided two separate applications by the Board Defendants, with accompanying letters from the Board Defendants stating that, "[The Board Defendants] are sending you a copy of the Plan Document which further explains the disability provisions," Royal never received a "Plan Document" or SPD, as alleged in his Amended Complaint. AC ¶¶ 52, 53, 55, 56, 58, 59, 60. (Ex. 2 to Hilliard Decl.) at 1-2. It was impossible for Royal to fully understand the application for benefits because the Board Defendants intentionally concealed the "Plan Document which further explains the disability provisions." *Id.*

Inexcusably, the Board Defendants sent these two letters to Royal with applications for benefits, but completely failed to include the "Plan Document"–whether that was the actual SPD they failed to furnish to him, or a copy of the Plan itself. *Id.*. If Royal had a copy of the "Plan Document" as referenced by the Board Defendants in the letters sent to Royal containing his

application for benefits, Royal would have had at least some information about the disability provisions he was applying for. *Id.*; *see also* AC ¶¶ 45, 53, 58, 59, 60, 62.

The Board Defendants have produced no evidence suggesting that the SPD was ever sent to Royal prior to him applying for benefits through the Plan. *See generally* (ECF No. 16-2) Royal has already shown this Court that clearly the Board Defendants had Royal's mailing address, that the Board Defendants had sent two applications for benefits in letters sent and received by Royal, and the Board Defendants could have easily sent a copy of the SPD, Plan, or "Plan Document" as the Board Defendants refer to whatever they were going to send Royal, but never fulfilled their required and fiduciary duty. (Ex. 2 to Hilliard Decl.) at 1-2; *see also* (Ex. 19 to Hilliard Decl.)

Since the Court is required to accept all factual allegations set forth in the complaint as true, and draw all reasonable inferences in favor of Plaintiff, the reasonable inference is that Plaintiff was **never** provided an SPD, Plan, or "Plan Document", as referred to by the Board Defendants, before submitting his initial application for benefits, which precluded him from having any definitions, illustrations, or examples that he needed in applying for the benefits at issue in this case. *Id.*; *see also Erickson,* 551 U.S. at 93-94. As such, since there is genuine issue of material fact as alleged by Plaintiff that he never received a copy of the "Plan Document" that the Board Defendants stated twice that they would send to him, and since the Board Defendants have yet to produce one shred of evidence suggesting that they sent him the SPD, Plaintiff has stated a viable claim that the Board Defendants violated ERISA by failing to furnish an SPD to Royal before his initial applications for benefits, and subsequently failed to produce him the relevant 1995 Plan or 1999 SPD that applied to his original application for benefits until 2015. AC ¶¶ 10, 30, 41, 42, 43, 50. This is not, as the Board Defendants would have this Court believe, "an innocent oversight" but a conscious decision to conceal the SPD from Royal. (ECF No. 16-2) at 18; *see also* AC ¶¶ 52, 53, 55, 56, 58, 59, 60.

B. County I is Not Barred by the Statute of Limitations

In the Second Circuit, the statute of limitations of ERISA actions does not begin to run until "there has been 'a repudiation by the fiduciary which is *clear* and made known to the beneficiaries.'" *Miles v. N.Y. State Teamsters Conf. Pension & Ret. Fund Emp. Pension Ben. Plan*, 698 F.2d 593, 598 (2d Cir. 1983) (quoting *Valle v. joint Plumbing Indus. Bd.*, 623 F.2d 196, 202 n.10 (2 Cir. 1980)). Royal's Amended Complaint alleges that Royal never received a copy of the Plan or SPD before his original application for benefits, never knew the Board Defendants had specific interpretations to "changed circumstances" and "clear and convincing evidence," and that Royal was not provided a copy of the 1995 Plan or 1999 SPD until February 1, 2016–two months after Royal received his final denial for reclassification–and almost sixteen years after the Board Defendants stated in their March 2, 2000 letter. (Ex. 2 to Hill. Decl.) at 2; *see also* AC ¶¶ 45, 50, 53, 58, 59, 60, 62. The documents and definitions that were supposed to be furnished to Royal prior to his application for disability benefits were not furnished to him until February 1, 2016. *Id.*

"The statute of limitations is an affirmative defense as to which defendants bear the burden of proof." *Trs. Of the N.Y. City Dist. Council of Carpenters Pension Fund v. Lee*, No. 15 CV 8081, 2016 WL 1064616, at *9 (S.D.N.Y. Mar. 14, 2016) (citing *Harris v. City of N.Y.*, 186 F.3d 243, 251 (2d Cir. 1999) (denying motion to dismiss in ERISA case on statute of limitations grounds.) To succeed on a statute of limitations affirmative defense, the Board Defendants must "identify from the face of the complaint and taking all inferences in [plaintiff's] favor, the precise moment at which the [] limitations began to run" because Plaintiff had sufficient "information to state his own viable claims." *Charles Schwab v. Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 95 (2d Cir. 2018) (reversing dismissal). Even if the Board Defendants submitted purportedly contrary extraneous materials, which they have not produced as an exhibit to their motion, nor did they send to Royal when they provided his entire NFL file upon request, Royal's allegations in his Amended Complaint denying his knowledge of the SPD or Plan defeats dismissal. *Lee*, 2016 WL 1064616, at *10-11 (relying on *Harris*); *see Sachdev v. Singh*, No. 15

CV 7114, 2016 WL 768861, at *9 (S.D.N.Y Feb. 26, 2016) (denying motion to dismiss based on "constructive knowledge" where complaint did not allege when plaintiff acquired knowledge).

"As ERISA does not prescribe a limitations period for actions under § 1132, the controlling limitations period is that specified in the most nearly analogous state limitations statute." *Miles*, 698 F.2d at 598 (citing *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980). The *Miles* court further held that "the six-year limitations period prescribed by New York's C.P.L.R. § 213 controls." *Id.* at 598. Since ERISA failed to "prescribe a limitations period," the Second Circuit's reference to N.Y. C.P.L.R § 213 is understood to be referring to N.Y. C.P.L.R. § 213 (1). *Id.* N.Y. C.P.L.R. § 213(1) provides a six-year statute of limitations for "an action for which no limitation is specifically prescribed by law." The SPD in this case is not a contract, and SPD cannot be enforced like a contract, or like the Plan itself. *Osberg v. Foot Locker, Inc.*, 907 F. Supp. 2d 527, 533 (S.D.N.Y. 2012), aff'd in part, vacated in part, 555 F. App'x 77 (2d Cir. 2014). In that ruling, the court held that the three year period governing statutory violations was appropriate for "an action to recover upon liability, penalty or forfeiture created or imposed by statute except as provided in section 213 and 215." *Id.* at 533; *see also* N.Y. C.P.L.R. § 214(2). On appeal, the Second Circuit never addressed the question of the limitations period for ERISA § 102 claims. *See Osberg v. Foot Locker, Inc.*, 555 F. App'x 77 (2d Cir. 2014) (unpublished). Since this question was never addressed, the six-year statute of limitations for actions under ERISA remains binding authority in this Circuit.

The Second Circuit stated, with respect to an ERISA § 102(a) claim, "we need not conclusively decide whether Osberg's § 102(a) claim is subject to a three- or six-year statute of limitations." *Id.* at 80. Royal's claims the SPD was not furnished to him in accordance with ERISA are not time-barred as Royal had six-years from the date of discovery of the breach or violation–which was February 1, 2016–when Royal finally received a copy of the SPD that was supposed to be furnished to him before his original application for benefits in 2000. 29 U.S.C. § 1113(2); 29 U.S.C. § 1022(a); AC ¶ 42, 50, 69. Since Royal discovered that the Board Defendants had concealed the SPD or "Plan Document" on February 1, 2016, when he finally

received the applicable SPD, that is when his statute of limitations began to run, and the six-year limitations applies to this case because the Board Defendants, without any explanation, failed to provide Royal with a copy of the SPD, even though the Board Defendants supposedly were "sending [Royal] a copy of the Plan Document which further explains the disability provisions" in March and July of 2000. (Ex. 2 to Hilliard Decl.) Based on the Board Defendants' failure to provide the "Plan Document" or SPD for sixteen years, the reasonable inference that can be drawn is that the Board Defendants actively concealed the relevant document from Royal, that explained the disability provisions, which was needed for his original application for benefits.

III. COUNT II ALLEGES A VALID AND TIMELY BREACH OF FIDUCIARY DUTY CLAIM UNDER ERISA § 404(a)(1)(A) & (B)

County II alleges that the Board Defendants breached their fiduciary duties under ERISA § 404(a)(1)(A) & (B), 29 U.S.C. § 1104(a)(1)(A) & (B), by failing to give Royal a copy of the SPD before his original application for benefits, by intentionally and fraudulently concealing it from Royal for sixteen years, failing to furnish a copy of the Plan after repeated requests, falsely telling Royal that the "Plan Document" would be coming in the mail (and then never was mailed out), and for failing to communicate the information about the standard required if Royal wanted to seek reclassification. AC ¶ 69; *see also* (Ex. 2 to Hilliard Decl.)

A. Board Defendants Breached their Fiduciary Duties by Failing to Disclose the SPD to Royal

The Board Defendants, as plan administrators, are required to periodically disseminate SPDs. 29 U.S.C. § 1024(b)(1)-(3); 29 U.S.C. § 1022(a). Contrary to the Board Defendants assertions, Royal does allege that the Board Defendants failed to distribute SPDs to Royal. (ECF 16-2) at 15; *see also* AC ¶¶ 65, 66, 67 ("The Board Defendants had an affirmative duty to provide the Plan and SPDs relevant to Plaintiff's application for disability benefits, but failed to disclose and inform Plaintiff the applicable documents and definitions absolutely needed for the application process."). The Board Defendants again incorrectly assert that "Royal does not allege he made (or the Plan failed to respond) to a 'written request' for the Plan Document or

the SPD." ECF 16-2 at 15; *see also* AC ¶¶ 10, 69 ("…by ensuring that he never received a copy of the 1995 Plan, **even after repeated requests** for the relevant Plan, only until the last and final decision was rendered by the Retirement Board did Plaintiff finally receive the 1995 Plan in February of 2016."), 72. Plaintiff has alleged, and the Board Defendants have failed to rebut, that Royal made requests for the SPD, and all relevant documentation that applied to his original application for benefits, and was not provided those documents until February of 2016. AC ¶¶ 42, 50, 69.

The Board Defendants curiously cite to a Fourth Circuit case from 1996 in order to bolster their position that "[s]ection 404 of ERISA does not impose any additional duty to disseminate SPDs or produce copies of the Plan Document." ECF 16-2 at 16. Interestingly, the case cited by the Board Defendants dealt with what documents a participant could request in *pre-litigation* under ERISA, and the Fourth Circuit decided that ERISA § 404(a)(1)(A) did not confer a right to *additional documents* other than those specified in ERISA § 104(b)(4). *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 657 (4th Cir. 1996). In *Faircloth*, the Fourth Circuit held that fiduciaries had a duty not to mislead plan participants and had a duty "to disclose information to beneficiaries when the trustee knows that failure to disclose might be harmful." *Id.* at 658 (citing and discussing cases).

The Board Defendants again cite to another jurisdiction to support their position that "a statutory violation does not automatically give rise to fiduciary liability." ECF 16-2 at 16; *see also Watson v. Deaconess Waltham Hosp.*, 141 F. Supp. 2d 145, 150 (D. Mass. 2001). What the Board Defendants failed to mention, was that the *Watson* ruling plainly stated "ERISA contains explicit disclosure requirements that obligate plan administrators to furnish participants and beneficiaries covered under a plan with: **summary plan description**; an annual statement of plan's assets, liabilities, receipts, and disbursements; and, upon request, a statement of a participant's or beneficiary's total accrued benefits and total accrued nonforfeitable pension benefits." *Id.* at 149 (emphasis added).

Under ERISA § 404(a)(1)(A) & (B) , "[a] fiduciary must discharge his duties 'solely in the interests of the participants and beneficiaries.' He must do this 'for the exclusive purpose' of providing benefits to them. And he must comply 'with care, skill, prudence, and diligence under the circumstances then prevailing' of the traditional 'prudent man.'" *Devilin v. Empire Blue Cross and Blue Shield*, 274 F.3d 76, 88 (2d Cir. 2001) (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982). Further, "a fiduciary has a duty to deal fairly and honestly with beneficiaries." *Id.* at 88 (quoting *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 124 (2d Cir. 1997). "When a plan administrator affirmatively misrepresents the terms of a plan **or fails to provide information when it knows that its failure to do so might cause harm**, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries." *Id.* at 88 (quoting *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255, 1264 (3d Cir. 1995) (emphasis added). "An ERISA fiduciary has an obligation to provide full and accurate information to the plan beneficiaries regarding the administration of the plan." *Id.* at 88 (quoting *Becher v. Long Island Lighting Co. (In re Long Island Lighting Co.)*, 129 F.3d 268, 271 (2d Cir. 1997).

Royal has alleged, and supported with documentation, that the Board Defendants knew that Royal did not have a copy of the SPD at the time of his original application, the Board Defendants told Royal they would be furnishing him a copy of the "Plan Document" needed to "explain the disability provisions" but failed to do so in order for Royal to apply for the benefits he was entitled to, i.e., Active Football benefits. (Ex. 2 to Hilliard Decl.). The Board Defendants knew, at the time of this correspondence to Royal, that he would be applying for benefits within one year, or shortly after, he left the Indianapolis Colts, and that he did not have the explanations of the disability benefits he needed to apply for. Failing to provide a plan participant with explanations of disability benefits "might cause harm" and in fact, did cause harm to Royal. *Devilin*, 274 F.3d 76 at 88. The Board Defendants inexcusably continue to mock Royal for the serious injuries he sustained in his career in the NFL, stating that Royal did not allege the Board misrepresented the Plan or had knowledge that he would be harmed "when–

with the assistance of a representative, no less – he filed an application for and was awarded a specific category of benefits that happened to pay him a substantial income." (ECF 16-2) at 16. What the Board Defendants continue to underscore, which has become a pattern over the past several decades and continuing into the present with no end in sight, is that these former football players sustain serious injuries to their brain on a daily basis and of course, Royal did need a "representative" to help him with what should be easy tasks, that is, filing for disability benefits due to brain trauma. The Board Defendants completely misstate the law, in addition to their many factual misrepresentations, and that is the fact that the Board Defendants did not need "knowledge [] that he would be harmed," but in failing to provide the SPD, the Board Defendants knew, or should have known, that failure to provide Royal the SPD *might* cause harm if someone with a brain injury does not have the explanations of "disability provisions." ECF 16-2 at 16; (Ex. 2 to Hilliard Decl.); *Devilin*, 274 F.3d 76 at 88.

B. Board Defendants' Fraud and Fraudulent Concealment of the SPD, Plan, and "Plan Document"

The Board Defendants continue to state that "Plan Document" is not the proper terminology for the SPD, and while that may be true, the Board Defendants' clearly use "Plan Document" when referring to the SPD. *See* (ECF 16-5) at 2 ("Plan Document"); *see also* (ECF 16-2) at 12 ("Count I seemingly alleges the Plan Document violated section 102 of ERISA. AC ¶ 53"); *see also* ¶ 53 (no reference of "Plan Document"). In any event, the Board Defendants fraudulently concealed the SPD from Royal, as evidenced by the NFL file sent to Royal that does not contain any documentation of when the SPD or Plan Document was sent to Royal, or any other correspondence from the Board Defendants indicating that the SPD that applied to his original application for benefits was ever sent to him. (Ex. 2 to Hilliard Decl.)

In addition to Royal's allegations that the Board Defendants breached their fiduciary duties, Royal also has alleged that the Board Defendants committed "(1) a self-concealing act – an act committed during the course of the breach that has the effect of concealing the breach from the plaintiff; [and/or] (2) active concealment – an act distinct from and subsequent to the

breach intended to conceal it." *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 189 (2d Cir. 2001); *see also* AC ¶¶ 42, 48, 55, 69, 72, 74. Plaintiff has alleged that the Board Defendants, by continuously telling Plaintiff that a copy of the "Plan Document" would be mailed to him, and never following through on the promise, definitively knew that Royal did not have the Plan Document which is used to "explain the disability provisions" at the time of his application, and when his application was submitted and reviewed by the Board Defendants. (Ex. 2 to Hilliard Decl.) The breach by the Board Defendants was failing to furnish Royal with a copy of the SPD. 29 U.S.C. § 1024(b)(1)-(3); 29 U.S.C. § 1022(a). The concealment was, after repeatedly acknowledging that Royal did not have a copy of the "Plan Document" but that one was going to be sent to him, the Board Defendants knew that a breach had already been committed because of the failure to provide the SPD or "Plan Document." (Ex. 2 to Hilliard Decl.) The continuous fraud perpetrated by the Board Defendants was the fact that Royal never received a copy of an SPD or "Plan Document" for the years after his application for benefits and awarding of Football Degenerative benefits. AC ¶¶ 10, 30, 41, 42, 43, 50, 53, 69.

The Board Defendants argue that "Royal's fraud and concealment allegations also fail because they are not plausible." ECF 16-2 at 17. As stated above, "Given that the plausibility requirement '**does not** impose a **probability** requirement at the pleading stage' the *Twombly* Court noted that 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely.'" *Anderson News*, 680 F.3d at 185; *Ott v. Fred Alger Mgmt., Inc.*, 2012 WL 4767200, at *6 (S.D.N.Y. Sept 27, 2012) ("While other inferences from the facts also may be plausible, a court 'may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible.'") The Board Defendants want this Court to believe that this absolute failure to follow ERISA and furnish SPDs *prior to applying for disability benefits*, was "that the Plan staff did in fact send the Plan Document, as stated in the letter, or the sender of the letter forgot to include the Plan Document." (ECF 16-2) at 18. A

close examination of the words used in both the March and July 2000 will show the deception committed by the Board Defendants:

> Pursuant to our conversation, **enclosed** is an application for disability benefits under the [] Plan … ***We are sending you a copy of the Plan Document which further explains the disability provisions***…

(Ex. 2 to Hilliard Decl.) The Board Defendants completely misrepresented to the Court that the "Plan staff did in fact send the Plan Document, as stated in the letter" with no correspondence to the affect, "or the send of the letter [simply] forgot to include the Plan Document". *Id.* This gross explanation by the Board Defendants is again very disturbing. ***First***, the Board Defendants could have easily "enclosed" a copy of the SPD or Plan Document with the application for disability benefits so Royal would have received both at the same time and could have filled out his application with the SPD or "Plan Document" handy. ***Second***, the March and July 2000 letters do not say that the "Plan Document" or SPD is attached to the letter, like it says the application is. ***Third***, in the dozens of letters sent to Royal by the Board Defendants, in the NFL file sent to Royal by the Board Defendants, not one piece of correspondence, before or after he retired from football, references that Royal was sent a copy of an SPD or Plan Document.

Royal has stated a viable claim for the Board Defendants' breach of their fiduciary duties by failing to furnish a copy of the SPD or Plan Document when Royal became a participant of the Plan, and prior to his original application of benefits. Royal further has sufficiently alleged that the Board Defendants committed fraud and/or fraudulently concealed the SPD and Plan Document from Royal for sixteen years before Royal finally received the documents he needed prior to his original application for benefits, and at that time, in February of 2016, he discovered the concealment committed by the Board Defendants of the key definitions of Active Football and Football Degenerative, that was used in his application of benefits in July of 2000. The Board Defendants had ample opportunity to correct their breaches, but chose to try and conceal the breaches from Royal, tolling the statute of limitations with respect to his ERISA claims, and making his claims strong enough to survive the Board Defendants' motion to dismiss. Plaintiff

respectfully asks this Court to deny the Board Defendants' motion to dismiss with respect to Counts I and II.

IV. SECOND CIRCUIT HAS YET TO DETERMINE WHETHER PLAINTIFF IS ENTITLED TO A JURY TRIAL ON HIS BREACH OF FIDUCIARY CLAIMS

"ERISA impliedly preserved the right to a jury trial on contractual issues, and the beneficiary had a Seventh Amendment right to a jury trial on issues that involved mixed questions of law and fact." *Vicinanzo v. Brunschwig & Fils, Inc.,* 739 F. Supp. 882 (S.D.N.Y. 1990) (issue of continuing beneficiary's rights under employee benefit plan policy and extent, if any, that employer and insurer interfered with those rights raised mixed questions of fact and law).

"Because the issue of whether a jury trial is available in an ERISA breach of fiduciary duty claim is currently pending on an appeal to the Second Circuit and parties may move to strike a demand for a jury trial up until the eve of trial, the Court will permit Plaintiff to amend his Complaint to demand a jury trial without prejudice to a motion by Committee Defendants to strike the demand at a later date." *Bekker v. Neuberger Berman Inv. Comm.*, No. 16 CV 6123-LTS-BCM, 2019 WL 2073953, at *5 (S.D.N.Y. May 9, 2019); *see also* Notice of Appeal, *Sacerdote v. New York Univ.*, No. 16-CV-6284 (RWS) (S.D.N.Y.), Docket Entry No. 355, ¶ 7.

CONCLUSION

For the foregoing reasons, the Court should deny the Board Defendants' motion to dismiss and motion to strike the jury demand.

Dated: September 30, 2019

Respectfully Submitted,

HILLIARD MARTINEZ GONZALES, LLP

By: /s/ *Robert C. Hilliard*
Robert C. Hilliard
Texas State Bar No. 09677700
Federal ID No. 5912
bobh@hmglawfirm.com

719 S. Shoreline Blvd.
Corpus Christi, Texas 78401
Telephone No.: (361) 882-1612
Facsimile No.: (361) 882-3015

Of Counsel:
BEN CRUMP LAW, PLLC

Ben Crump
Florida State Bar No. 72583
court@bencrump.com
122 S. Calhoun Street
Tallahassee, Florida 32301
Telephone No.: (850) 224-2020

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2019, I served the foregoing document on all counsel of record by a manner authorized by Federal Rules of Civil Procedure 5 (b)(2).

By: /s/ *Robert C. Hilliard*
Robert C. Hilliard